



INTERIOR BOARD OF INDIAN APPEALS

Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Director,
Bureau of Indian Affairs

17 IBIA 144 (06/21/1989)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

FORT McDERMITT PAIUTE SHOSHONE TRIBE

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-17-A

Decided June 21, 1989

Appeal from a decision of the Acting Phoenix Area Director, Bureau of Indian Affairs, rescinding four chapters of the Fort McDermitt tribal law and order code.

Affirmed.

1. Bureau of Indian Affairs: Generally--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

The Department of the Interior has authority to interpret a tribal constitution with respect to the Secretary's ordinance approval role under the constitution.

2. Indian Reorganization Act--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

Neither the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1982), nor any other Federal law, contains a general requirement for approval of tribal ordinances by Federal officials. However, Indian tribes may, as a matter of tribal law, include an approval provision in their constitutions.

3. Bureau of Indian Affairs: Generally--Delegation of Authority--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Secretary of the Interior

The Secretary of the Interior may delegate to subordinate officials the authority to approve tribal ordinances granted to him in tribal constitutions.

APPEARANCES: Chief Judge/Tribal Chairman Ronald E. Johnny, Esq., McDermitt, Nevada, for appellant; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Fort McDermitt Paiute Shoshone Tribe (tribe) challenges a December 12, 1988, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (appellee; BIA), rescinding four chapters of the tribal law and order code. For the reasons discussed below, the Board affirms that decision.

Background

The tribe is organized under the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479 (1982). ^{1/} Its present constitution was adopted on May 30, 1936, and approved by the Secretary of the Interior on July 2, 1936. Article VI, section 1(f), authorizes the Tribal Council:

To promulgate and enforce ordinances which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Fort McDermitt Paiute and Shoshone Tribe of Indians of the Fort McDermitt Indian Reservation, providing for the manner of making, holding, and revoking assignments of tribal land or interests therein, providing for the levying of taxes and the appropriation of available tribal funds for public purposes, providing for the licensing of nonmembers coming upon the reservation for the purpose of hunting, fishing, trading, or other business, and for the exclusion from the reservation of persons not so licensed and establishing proper agencies for law enforcement upon the Fort McDermitt Indian Reservation.

Article VI, section 4, provides:

Manner of review.--Any resolution or ordinance which by the term of this constitution, is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the Reservation, who shall, within 10 days thereafter, approve or disapprove the same.

If the Superintendent shall approve any ordinance or resolution, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may, within 90 days from the date of enactment, rescind the said ordinance or resolution for any cause, by notifying the Tribal Council of such decision.

If the Superintendent shall refuse to approve any ordinance or resolution submitted to him, within 10 days after its enactment, he shall advise the Council of his reasons therefor. If these reasons appear to the Council insufficient, it may by a majority vote, refer the ordinance or resolution to the Secretary

^{1/} All further references to the United States Code are to the 1982 edition.

of the Interior, who may, within 90 days of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.

On September 13, 1988, the Fort McDermitt Tribal Council enacted Chapters 1 through 19 of a law and order code. The 19 chapters, each enacted by a separate resolution, were transmitted by the tribe to the Superintendent, Western Nevada Agency, BIA, for review in accordance with the tribe's Constitution. The Superintendent disapproved Chapter 2, but approved the remaining chapters on September 29, 1988. On the same day, he transmitted the approved chapters to the Phoenix Area Office.

In a decision dated December 12, 1988, appellee rescinded Chapter 3, Criminal Proceedings; Chapter 6, Juvenile Proceedings; Chapter 7, Criminal Offenses; and Chapter 8, Traffic Offenses. 2/

The tribe appealed the decision under the appeal procedures then in effect, 25 CFR Part 2 (1988), and its appeal was transmitted to the Washington, D.C., office of BIA for decision. On March 17, 1989, the Acting Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) transmitted the appeal to the Board for consideration in accordance with new appeal procedures for BIA and the Board which became effective on March 13, 1989. See 54 FR 6478 and 6483 (Feb. 10, 1989).

The appeal was docketed on March 23, 1989. Both appellant and appellee filed briefs on appeal.

Discussion and Conclusions

On appeal to the Board, the tribe argues: (1) the IRA does not provide authority for the review of tribal ordinances by any Federal official, (2) the tribal constitution is the only authority for such review, (3) the tribal constitution does not authorize the Secretary of the Interior to delegate his ordinance review authority to a subordinate official, (4) the ordinance review provision of the tribal constitution is not authorized by Federal law and was an attempted fraud upon tribal members by Federal officials, (5) appellee's rescission of the ordinance was untimely, (6) the Superintendent of the Western Nevada Agency is not the "Superintendent of the Reservation" authorized by the tribal constitution to approve tribal ordinances, and (7) the tribal constitution must be interpreted literally and in accordance with the tribe's interpretation.

The tribe's last argument will be addressed first.

[1] The Board has often held that BIA and the Board must give deference to a tribe's reasonable interpretation of its own laws. E.g., Estate of Mary Dodge Peshlakai v. Navajo Area Director, 15 IBIA 24, 93 I.D. 409 (1986). However, it has also held that the Department has the authority

2/ These four chapters were enacted by Resolutions Nos. FM-88-009-038, FM-88-009-041, FM-88-009-42, and FM-88-009-043.

to interpret tribal law where necessary to carry out the government-to-government relationship with the tribe. Thompson v. Eastern Area Director, 17 IBIA 39 (1989); Menominee Tribal Enterprises v. Minneapolis Area Director, 15 IBIA 263 (1987); Crooks v. Minneapolis Area Director, 14 IBIA 181 (1986).

In this case, BIA was required to interpret the tribe's constitution in order to carry out the Department's ordinance review responsibility under the constitution. In approving the constitution in 1936, the Secretary undertook the responsibility of reviewing tribal ordinances pursuant to the government-to-government relationship with the tribe. The Board holds that the Department has authority to interpret the tribe's constitution with respect to the ordinance review obligations assumed by the Department.

[2] The tribe's arguments (1) and (4) both concern the Federal statutory authority, or lack thereof, for review of tribal ordinances by Federal officials. The tribe contends that, because there is no authority in Federal law for such review, the actions of BIA personnel who assisted the tribe in drafting its constitution (and who presumably encouraged the inclusion of a review provision) constituted an attempted fraud against the tribal members. It requests the Board to "declare [that] the language in question was neither authorized [n]or required by the Indian Reorganization Act" (Tribe's Opening Brief at 10).

It is established that the IRA, while it requires Secretarial approval of tribal constitutions, does not require that a constitution make tribal ordinances subject to Secretarial approval. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 198 (1985). The Board is not aware of any other Federal statute that mandates Federal approval of the tribal enactments at issue in this appeal. However, the Board is also unaware of any Federal statute that precludes the tribe, or would have precluded it in 1936, from including an ordinance review requirement in its constitution as a matter of tribal law.

The tribe is undoubtedly correct that the BIA officials who assisted the tribe in drafting its constitution encouraged it to include an ordinance review provision. Nevertheless, it was the tribal members who voted to adopt the constitution, including the review provision. That provision is now a matter of tribal law and will remain so until it is removed from the constitution by another vote of the tribal members. As the Supreme Court noted in Kerr-McGee, tribes such as the Fort McDermitt Tribe, which adopted constitutions in the early years of the IRA, "are free, with the backing of the Interior Department, to amend their constitutions to remove the requirement of Secretarial approval." 471 U.S. at 199. The Board has no reason to believe that BIA would not approve an amendment to the Fort McDermitt constitution which removed the review provision.

[3] In its arguments (2), (3), and (6), the tribe contends that, because the tribal constitution is the only authority for review of tribal ordinances, only those Interior Department officials specifically mentioned in the constitution may exercise the review authority set out therein. Therefore, in the tribe's view, only the Secretary of the Interior himself,

not a subordinate official exercising delegated Secretarial authority, may perform the Secretary's review function in the constitution. Further, the tribe contends, only the "Superintendent of the Reservation" specified in the constitution, not the present Superintendent of the Western Nevada Agency, may perform the Superintendent's approval function. The tribe argues that attempts to delegate authority to officials other than those named in its constitution are unilateral attempts by Interior officials to amend its constitution by means of "secret, non-published, administrative orders" (Tribe's Opening Brief at 8).

Appellee responds that the Secretary of the Interior has properly delegated his ordinance review authority in accordance with Federal law and that appellee has the full delegated authority of the Secretary to act on the tribe's ordinances.

In 1946, 10 years after the Fort McDermitt constitution was adopted, Congress authorized the Secretary of the Interior and the Commissioner of Indian Affairs to delegate their powers and duties under the laws governing Indian affairs. The Act of August 8, 1946, 25 U.S.C. § 1a, provides in relevant part:

For the purpose of facilitating and simplifying the administration of the laws governing Indian affairs, the Secretary of the Interior is authorized to delegate, from time to time, and to the extent and under such regulations as he deems proper, his powers and duties under said laws to the Commissioner of Indian Affairs, insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior pursuant to law. Subject to the supervision and direction of the Secretary, the Commissioner is authorized to delegate, in like manner, any powers and duties so delegated to him by the Secretary, or vested in him by law, to the assistant commissioners, or the officer in charge of any branch, division, office, or agency of the Bureau of Indian Affairs, insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior or the Commissioner of Indian Affairs pursuant to law. Such delegated powers shall be exercised subject to appeal to the Secretary, under regulations to be prescribed by him, or as from time to time determined by him, to the Under Secretary or to an Assistant Secretary of the Department of the Interior, or to the Commissioner of Indian Affairs.

In 1947, the Solicitor considered the question of whether the Secretary's ordinance review authority under IRA constitutions could be delegated to the Commissioner of Indian Affairs. He noted that, for a period of about 10 years prior to enactment of the 1946 statute, the Secretarial approval authority had been exercised by the Under Secretary and various Assistant Secretaries under general delegations of authority. He found that general principles governing the delegation of Secretarial powers authorized the delegation of such authority to the Commissioner. Further, he found that the 1946 act provided additional and conclusive support for the view that

the Secretary's ordinance review authority could be delegated to the Commissioner. "Delegation of Veto Power over Tribal Legislation," Solicitor's Opinion, 59 I.D. 552, 558-59, 11 Op. Sol. on Indian Affairs 1457, 1459 (May 16, 1947).

The 1946 act provides that any authority delegated to the Commissioner may be redelegated by him to subordinate BIA officials. Therefore, because the statute authorizes delegation of ordinance review authority to the Commissioner, as the Solicitor concluded, it also authorizes delegation to subordinate officials. Accordingly, it is clear that the authority to exercise the Secretary's ordinance review authority under IRA constitutions may be redelegated to BIA officials subordinate to the Commissioner, including appellee.

The tribe argues that, pursuant to the Supreme Court's decision in Morton v. Ruiz, 415 U.S. 199 (1974), delegations of authority concerning review of tribal ordinances are invalid absent publication in the Federal Register, because the delegations have the effect of amending the tribe's constitution. In Ruiz, the Supreme Court held that the Administrative Procedure Act, 5 U.S.C. § 552(a), requires BIA to publish eligibility requirements for its general assistance program in the Federal Register.

The delegation of the Secretary's authority to review tribal ordinances has been published in the Federal Register. Section 18 of Secretarial Order No. 2508, 14 FR 258, 259 (Jan. 18, 1949), set out the initial delegation to the Commissioner of Indian Affairs. ^{3/} This section

^{3/} Section 18 provided:

"Tribal ordinances and resolutions. (a) To the extent indicated in this section, the Commissioner of Indian Affairs is authorized to exercise the authority of the Secretary of the Interior with respect to passing upon tribal ordinances or resolutions adopted, subject to Secretarial review or approval, pursuant to constitutions approved or charters issued under section 16 or section 17 of the act of June 18, 1934, as amended (25 U.S.C. secs. 476, 477).

"(b) The Commissioner of Indian Affairs may approve any such ordinance or resolution which, in his judgment, is not inconsistent with the provisions of any act of Congress or of any treaty or of the tribal constitution or charter under which the ordinance or resolution was adopted, and such approval shall have the same force and effect as if given by the Secretary of the Interior. As used in this paragraph, the word "approve" includes, but is not limited to, the confirmation of an approval given by a subordinate official and the rescission of a disapproval given by a subordinate official.

"(c) The Commissioner of Indian Affairs shall forward to the Secretary of the Interior, with his recommendation, any such ordinance or resolution which he believes to be inconsistent with an act of Congress or with a treaty or with the tribal constitution or charter under which the ordinance or resolution was adopted, or which, in his opinion, should be disapproved or rescinded for any other reason.

was amended in 1954 and 1966. See 19 FR 4585 (July 24, 1954); 31 FR 6551 (Apr. 30, 1966). In 1974, the power to rescind ordinances, which had been excepted from the earlier delegations, was delegated to the Commissioner by means of a general program delegation. 39 FR 32166 (Sept. 5, 1974). The Commissioner's redelegation of authority to the Area Directors, including ordinance review authority, has also been published in the Federal Register. See, e.g., 34 FR 637 (Jan. 16, 1969); 40 FR 17046 (Apr. 16, 1975). The authorities formerly delegated to the Commissioner were delegated to the Assistant Secretary - Indian Affairs in 1977, when that position was established. Secretarial Order No. 3010, 42 FR 53682 (Oct. 3, 1977).

Although more recent delegations of authority have not been published in the Federal Register, but have appeared only in the Departmental Manual, the delegation concerning ordinance review authority is a well-established delegation and has been published repeatedly. Accordingly, the Board rejects the tribe's argument that the Secretary's delegation of authority to review tribal ordinances is invalid because it has not been published in the Federal Register.

The Board also rejects the tribe's argument that the Western Nevada Agency Superintendent lacks authority to approve its ordinances because he is not the "Superintendent of the Reservation" described in the constitution. The tribe contends that, in 1936, there was no centralized Western Nevada Agency but, instead, a Superintendent was assigned to its reservation.

The tribe did not challenge the Superintendent's action when taken; therefore, this issue is not properly raised in this appeal. Cf., e.g., Estate of George Neconie, 16 IBIA 120 (1988); Falcon Lake Properties v. Assistant Secretary--Indian Affairs, 15 IBIA 286, 292 (1987). If it had been properly raised, however, the Board would find that BIA has the authority to revise its organizational structure as necessary and to reassign the Superintendents' responsibility for approval of tribal ordinances in accordance therewith.

fn. 3 (continued)

“(d) In subdelegating, pursuant to section 25 [of Secretarial Order No. 2508], the powers and duties vested in him by this section, the Commissioner of Indian Affairs shall not, where a tribal constitution or charter provides for the consideration of ordinances or resolutions by the local superintendent or other specified official of the Bureau of Indian Affairs, subject to Secretarial review, delegate power with respect to such ordinances or resolutions to the official originally passing upon such ordinances or resolutions.

“(e) The authority delegated to the Commissioner of Indian Affairs in this section is in addition to, and not a limitation upon, other delegations of authority made to the Commissioner”

In its argument (5), the tribe contends that appellee's rescission of its ordinances was untimely. The tribe did not receive appellee's December 12, 1988, rescission letter until December 22, 1988, after the expiration of the 90-day review period set out in the constitution. It concedes, however, that the tribal chairman was informed of the rescission, by telephone call from a BIA employee, on December 12, 1988, the final day of the 90-day period (Tribe's Opening Brief at 4).

The tribe argues that the telephone call was ineffective notice under the tribe's constitution. However, the constitution does not specify any particular method by which notification must be delivered to the tribe. The word "notify," where the means of notification is unspecified, is commonly understood to include oral notice or notice by telephone, as well as written notice. See, e.g., Black's Law Dictionary 1211 (Rev. 4th ed. 1968); 58 Am. Jur. 2d Notice § 28 (1971).

The Board holds that, by telephoning the tribal chairman within the 90-day period, BIA notified the Tribal Council of the rescission, as required by the tribe's constitution.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 12, 1988, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs, is affirmed.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge